

37-1846

No. _____

Supreme Court, U.S.

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In the
Supreme Court of the United States

OCTOBER TERM, 1987

LAMBERT GRAVEL COMPANY, INC.

Petitioner,

v.

J.A. JONES CONSTRUCTION COMPANY, ET AL.,

Respondents.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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QUESTION PRESENTED

Whether the District Court erred in holding that Lambert's contractual right to supply a United States Corps of Engineers lock and dam project with sand from "existing streambed" in Louisiana's Red River constitutes a riparian property interest subject to the federal navigational servitude.

PARTIES TO THE PROCEEDING

PETITIONER:

- (1) Lambert Gravel Company, Inc.

RESPONDENTS:

- (1) J.A. Jones Construction Company
- (2) Aetna Casualty and Surety Company
- (3) Travelers Indemnity Company
- (4) Standard Fire Insurance Company
- (5) Lumberman's Mutual Casualty Company
- (6) Employer's Reinsurance Corporation
- (7) North American Reinsurance Corporation

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**PETITION FOR A WRIT OF CERTIORARI TO
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Petitioner, Lambert Gravel Company, Inc., respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 7, 1988.

OPINIONS BELOW

The January 7, 1988 Opinion of the United States Court of Appeals for the Fifth Circuit, affirming the District Court, is reported at 835 F.2d 1105, and is reprinted in the Appendix to

this Petition, *infra* at pp. 25a-40a. The April 1, 1986 Ruling of the United States District Court for the Western District of Louisiana, Alexandria Division, is unreported, but is printed in the Appendix, pp. 1a-17a.

JURISDICTION

The Judgment of the Court of Appeals affirming the District Court's grant of Defendants' motion for partial summary judgment was rendered and entered on January 7, 1988 (App., pp. 41a-42a). An Order denying Lambert Gravel Company's petition for rehearing was entered on February 8, 1988 (App., pp. 43a-44a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case presents Lambert Gravel Company's claim for increased costs under a government supply contract, against the prime contractor and six Miller Act sureties. 40 U.S.C. §§270a, *et seq.* Lambert seeks equitable relief for reimbursement of additional expenses it incurred when forced to terminate production from a borrow source to which Lambert had a right under its supply contract. The crucial issue is whether Lambert's Miller Act contract claim may be summarily dismissed as subject to the federal navigational servitude,

defined in the caselaw as a power which emanates from art. I, §8, cl. 3 of the United States Constitution. (App., p. 49a).

STATEMENT OF THE CASE

1. JURISDICTION IN THE LOWER COURTS

Lambert Gravel Company, Inc. ("Lambert") filed a complaint on July 25, 1984 in the United States District Court for the Western District of Louisiana, Alexandria Division. Jurisdiction was based upon 40 U.S.C. §270b and 28 U.S.C. §1332. The cause urges a contract claim arising under the Miller Act; alternative counts for breach of contract and warranty are based upon diversity of citizenship and amount. The sum in controversy exceeds \$10,000.00, exclusive of interest and costs, and the contract was performed in Louisiana's Western District.

Jurisdiction over Lambert's appeal to the United States Court of Appeals for the Fifth Circuit is based upon 28 U.S.C. §1291, pursuant to which "final decisions of the District Court may be appealed of right."

The Judgment appealed from was entered by the District Court on April 3, 1986 (App., p. 19a), granting Respondents' motion for partial summary judgment, and disposing of Lambert's claim for increased costs in the amount of \$2,153,148.00. This interlocutory judgment merged in a final judgment of partial dismissal, dismissing two smaller claims remaining for trial, entered on December 5, 1986 (App., pp. 21a-23a).¹

¹ Although a partial summary judgment is not appealable, and the appellate court lacks jurisdiction, such an interlocutory order merges in the final judgment and may be challenged on appeal from that judgment. *Baldwin vs. Redwood City*, 540 F.2d 1360, 1364 (9th Cir. 1976) reh. den.

2. BRIEF PROCEDURAL HISTORY

Pursuant to the Miller Act,² Lambert filed its complaint in the District Court, seeking an equitable price adjustment and additional compensation in the sum of \$2,153,148.00 under its "Purchase Order" contract with Respondent J.A. Jones Construction Company ("Jones"), and against its six sureties.³ Lambert contracted to supply sand to Jones, the general contractor on the massive lock and dam project overseen by the United States Army Corps of Engineers ("Corps") on Louisiana's Red River, which is a navigable waterway.

The claim arose under Lambert's contractual right to excavate "select sand" from a sandbar on the left descending bank of the Red River, between the ordinary high and low water marks. This disputed sandbar was part of the contract site, located on the oxbow loop lying south of, and cut off by, the new channel created by the lock and dam structure.

Lambert claims that its right to supply sand from the disputed bar was conferred by provisions of the Corps of Engineers' prime contract with Jones, as incorporated in the Lambert-Jones supply contract. Jones denied Lambert its contract right when, acting under directions from the Corps of Engineers, it forcefully removed Lambert from this sandbar, and required Lambert to secure alternative borrow sources from which to supply sand for the project.

Cross motions for summary judgment by both parties in the District Court raised the issue of whether Jones and the

² 40 U.S.C. §§270a, *et seq.*, App., pp. 45a-48a.

³ Jones' sureties listed in the complaint are Aetna Casualty and Surety Company, the Travelers Indemnity Company, Standard Fire Insurance Company, Lumberman's Mutual Casualty Company, Employer's Reinsurance Corporation and North American Reinsurance Corporation. The sureties are parties to this cause, and will be identified collectively with "Jones."

Corps may invoke the federal navigational servitude to extinguish the contractual right conferred on Lambert by provisions in the Corps' own prime contract for construction of the lock and dam.

By its motion filed on September 24, 1985, Jones claimed there are no genuine issues of material fact to be tried by the parties, since by virtue of the navigational servitude, Jones' removal of Lambert from the sandbar was not wrongful. Lambert's cross motion, filed on October 28, 1985, refuted applicability of the navigational servitude to Jones' taking — *not* of a riparian interest — but rather of a right which Jones itself had conferred on Lambert by contract.

After briefing, the District Court heard oral argument on February 3, 1986, after which it entered partial summary judgment on April 3, 1986, granting Jones' motion and denying Lambert's. Following settlement of two small claims, the interlocutory judgment dismissing Lambert's major claims was merged in a final judgment of partial dismissal, entered by the Court on December 5, 1986.

Lambert timely filed a notice of appeal in the District Court on December 30, 1986. After briefing, and oral argument on August 3, 1987, the Fifth Circuit affirmed the District Court's dismissal of Lambert's Miller Act claim as subservient to the federal navigational servitude. It is that decision which prompts this Petition for a Writ of Certiorari.

3. STATEMENT OF FACTS

By written contract styled "Purchase Order" (App., pp. 51a-59a) dated May 12, 1980, submitted by Jones and accepted by Lambert on July 30, 1980, Lambert agreed to supply materials to Jones for construction of the Corps' project designated

as "Red River Lock and Dam No. 1, Phase III, Catahoula Parish, Louisiana."

Under the terms of the Purchase Order, Lambert agreed, *inter alia*, to provide approximately 300,000 tons of select sand backfill at specified unit prices to be paid by Jones (App., p. 52a). The Purchase Order incorporated provisions of the plans, specifications, general provisions, special provisions and addenda for the project "as they pertain to the above materials" (App., p. 53a).

In Louisiana, the "banks" of navigable rivers (i.e., land such as the disputed bar which lies between the ordinary high and low water marks) are privately owned by the riparian property owners.⁴ This privately owned bank, however, is "subject to public use," provided such use is incidental to the purpose of navigation.⁵ The federal navigational servitude applies to all submerged lands (including "banks") extending from the ordinary high water mark on one bank of a navigable stream to the ordinary high water mark of the opposite bank. Consequently, the sandbar at issue, located on the bank of Red River, is the property of Louisiana Delta Plantation ("Delta," the adjacent landowner), and in addition is burdened by the federal navigational servitude.

Lambert leased Delta's interest in the sandbar. Lambert's right to supply specified "select sand" from that bar for the project, however, does not arise from the Delta lease, but rather is a right conferred by the Corps' prime contract, as it

⁴ See La. Civil Code art. 456; and *Wemple vs. Eastham*, 150 La. 247, 90 So. 637, 638 (1922); "The land lying between the edge of the water at its ordinary low stage and the line which the edge of the water reaches at its ordinary high stage, that is the highest stage — is called the bank of the stream, and belongs to the owner of the adjacent land."

⁵ La. Civil Code art. 456.

flows through the Lambert-Jones Purchase Order. The right to use the sandbar for supplying the project is a right of contract with Jones.

Lambert secured these rights before bidding the project, and the convenience and proximity of the disputed sandbar to the project was a cost factor which Lambert figured into its bid estimate, and on which it then relied.

Lambert commenced dredging on the sandbar in or about August, 1980, with the full knowledge of representatives from both Jones and the Corps. After dredging began, both Jones' and the Corps' inspectors observed Lambert's activities on a routine basis for nearly nine months, during which time Lambert was never notified of the necessity to seek alternative borrow sources.

Nevertheless, by letter dated May 11, 1981 (after Lambert had produced approximately 25,000 tons of sand from the sandbar), Jones issued a stop-work order, directing Lambert to cease removing the sand immediately, and directing Lambert to seek suitable material from other sources. Lambert was provided with a copy of a letter issued by the Corps' contracting officer, Adolfo Ramirez, Jr., which incorrectly construed Louisiana law on the ownership of navigable river banks. The letter stated, in pertinent part:

"The bottom of the river up to the ordinary high water line belongs to the State of Louisiana and not the Louisiana Delta Plantation. The State of Louisiana has already given this material to the federal government for a specific use (the closure dam). No use can be made of this material except for the closure dam."

By letter dated May 14, 1981, Lambert acknowledged receipt of the orders directing it to cease activities and to seek

another source of materials to be supplied under the Purchase Order. Lambert protested the orders, placed Jones and the Corps on notice that additional costs would arise from the subject orders, and reserved all rights and claims. Jones advised Lambert that no further materials from the sandbar would be accepted, and that further deliveries of such sand would be rejected as material from an unsuitable source.

Lambert eventually located another source of materials, approximately seven miles further away than the original dredge site, from which to supply materials to Jones under the Purchase Order contract. Before locating this source, Lambert was forced to procure an interim source of material, thirty miles further from the jobite than the disputed sandbar. Upon completion of operations, Lambert calculated its additional costs and expenses occasioned by the Jones directive to supply substitute materials. By letter dated November 16, 1983, Lambert served notice of its damages. Lambert's claim for increased costs occasioned by this effective change in specifications by Jones and the Corps amounts to \$2,153,148.00.

By this Petition for Writ of Certiorari, Lambert seeks redress of the abatement by reference to the navigational servitude of this valid Miller Act claim arising under its Purchase Order contract with Jones.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

This Miller Act claim by a government supplier is before this Court because the lower courts' decisions impermissibly

expand the United States' power under the federal navigational servitude, far beyond its traditional dominance over riparian property interests, now to impair essential contract rights given by the United States' own contract.

Lambert's Purchase Order contract with Jones to supply materials to the Red River Lock and Dam project incorporated provisions of Jones' prime contract with the Corps of Engineers which permitted Lambert to extract sand from the disputed sandbar. Jones' forced removal of Lambert from this borrow source at the behest of the Corps was wrongful, and effected a breach of contract for which Lambert seeks redress in this law suit.

The entire cannon of jurisprudence on the navigational servitude addresses claims by holders of riparian interests for Fifth Amendment just compensation; this is *not* such a claim. The lower courts' holdings that this contract action is dismissed by virtue of the navigational servitude is unprecedented in over one hundred years of caselaw.

This case presents for review the granting by the District Court of Respondents' motion for summary judgment. Accordingly, this court must determine whether the record demonstrates that "there is no genuine issue as to any material fact" and that Jones is therefore "entitled to Judgment as a matter of law." Fed.R.Civ.P. 56(c); see also *Galindo vs. Precision American Corp.*, 754 F.2d 1212, 1216 (5th Cir. 1985).

Whether Lambert's contract with Jones accords Lambert the right to excavate sand from the disputed sandbar is the crucial issue between the parties, and is material to proper resolution of Lambert's claim. Yet, the District Court failed even to address this issue, while the Court of Appeals pronounced the contract "silent as to where Lambert would

obtain sand.⁶ Absent trial, this determination not only lacks foundation but fails to rise above bare conjecture. The record unequivocally discloses relevant facts which are material to this determination.⁷

The question for review by this Court is singular: should the trier find as fact that the Lambert-Jones supply contract gives Lambert the right to dredge sand from the disputed bar, then this Court must decide whether to expand the federal navigational servitude to empower the United States to rescind a right conferred by its own prime contract, as incorporated in Lambert's Purchase Order. If this Court concurs with Lambert that the navigational servitude should *not* deprive Lambert of government contract rights, then summary dismissal by the District Court was inappropriate, and should not have been affirmed by the Fifth Circuit. The case should be remanded for trial of whether Lambert's right to supply the disputed sand to the project arose from its Purchase Order with Jones.

I. THE LOWER COURTS' ANALYSIS OF THIS MILLER ACT CLAIM AS THE ENFORCEMENT OF A LEASE RIGHT, AND THEIR REFUSAL TO PROPERLY VIEW IT AS A CLAIM ARISING FROM LAMBERT'S CONTRACT TO FURNISH SELECT SAND TO THE LOCK AND DAM PROJECT, IS ERROR.

The federal navigational servitude is defined as the dominant right of the United States over navigable waters for purposes of improving and regulating navigation. The servitude

⁶ See *Lambert Gravel Company, Inc. vs. J. A. Jones Construction Company*, 835 F.2d 1105, 1111 (5th Cir. 1988); App., pp. 37a.

⁷ See Paragraph 5.4 of Division 2, Section 2D ("BACKFILL AND EMBANKMENT") of the Specifications, as augmented by Amendment 0003 [*Infra*, at p. 15]; and the Affidavit of Philip Beard, P.E. [App., pp. 65a-67a].

flows from the Commerce Clause (art. 1, §8, cl. 3) of the United States Constitution, which grants to the federal government the power to regulate commerce between the states upon "all navigable waters of the United States" to assure that the same remain free and unobstructed public highways. *Gilman vs. Philadelphia*, 70 U.S. (3 Wall.) 713, 724-25 (1866).

Although the navigational servitude is a concomitant of the congressional power over interstate commerce, it has been carefully defined (and limited) in the jurisprudence. At the turn of our century, this Court observed that the servitude creates in a riparian owner:

". . . a qualified title [to submerged lands], a mere technical title, not at his disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation."⁸

More recently, this Court has noted that this dominant servitude grants the government a privilege to appropriate without compensation.⁹ It subordinates the Fifth Amendment right to just compensation for private property seized by eminent domain to the power of congress to regulate commerce. Thus, the navigational servitude represents a "dividing line between the public and private right."¹⁰

Although the courts have often pondered where that line should be drawn, neither this Court nor any lower court has ever permitted a party to wield the navigational servitude as a defense to a government supply contract claim.

⁸ *Scranton vs. Wheeler*, 179 U.S. 141, 163, 21 S. Ct. 48, 57 (1900).

⁹ *United States vs. Virginia Electric and Power Company*, 365 U.S. 624, 81 S. Ct. 784, 787-88 (1961).

¹⁰ *United States vs. Cress*, 243 U.S. 316 (1916).

Lambert is *not* Delta Plantation, and does not seek compensation for the value of riparian property interests, but rather an adjustment in the price of its supply contract with Jones, based on the incurrence of additional costs occasioned by Jones' ouster of Lambert from the sandbar. The Court of Appeals held that Lambert's claim arises solely from this wrongful eviction and is therefore entirely "dependent upon the legal ramifications of its lease with Delta." The Fifth Circuit further stated that Lambert's claim "cannot arise from the Lambert Contract."¹¹

This is error, and ignores Lambert's primary capacity as a contracting party. Lambert has never tried to obfuscate its status as possessor of the leasehold in Delta's riparian property rights. As explained in the above Statement of the Case,¹² the lease was negotiated with Delta under the Louisiana regime of riparian ownership of adjacent banks.

Lambert however is *not* suing as a riparian leaseholder seeking just compensation for loss of property; Lambert is a government supplier aggrieved by deprivation of valuable contract rights which the government itself proffered in the prime contract for construction of the lock and dam.

The claim for increased costs for breach of that contract is the *only* claim urged by Lambert in this Court. The error of impairment of government supply contract rights by imposition of the federal navigational servitude is the only argument urged in this Court. The courts below focused on alternative questions of whether congress manifested an intent to surrender the servitude, or authorized the Corps of Engineers to consent to an encroachment on the servitude. These are sepa-

¹¹ *Lambert Gravel Company, Inc. vs. J. A. Jones Construction Company*, supra, at pp. 1111 (App., p. 37a).

¹² See n. 4 *infra*, and accompanying text at pp. 6-7.

rate issues, not to be confused with the more crucial issue of whether the navigational servitude can abate valid Miller Act claims. That is the sole question Lambert presents for argument. All other claims by Lambert are not presented for decision herein.

II. LAMBERT'S CONTRACTUAL RIGHT TO EXTRACT SELECT SAND FROM "EXISTING STREAMBED" ON THE PROJECT SITE DOES NOT CONSTITUTE A "RIVERBED INTEREST" SUCH AS THE COURT IN *CHEROKEE* HELD SUBJECT TO THE FEDERAL NAVIGATIONAL SERVITUDE.

The recent unanimous decision by this Court in *United States vs. Cherokee Nation of Oklahoma*,¹³ addressed the question of whether the United States must pay the Cherokee Nation Fifth Amendment just compensation for damage to the tribe's riverbed interests caused by navigational improvements which the government made on the Arkansas River. The Court had previously determined that the Echota treaty between the Cherokee, Chickasaw, and Choctaw tribes and the United States granted the tribes fee simple title to the riverbed.¹⁴ The Cherokee tribe argued accordingly that the decision in *Choctaw Nation* created a "unique situation by which a portion of the navigable Arkansas River is essentially a private waterway belonging exclusively to the Cherokee Nation."¹⁵ Concerning the dominance of the navigational servitude over these "unique" riverbed interests, the Court clearly held that:

¹³ 107 S. Ct. 1487 (1987).

¹⁴ See *Choctaw Nation vs. Oklahoma*, 397 U.S. 620, 90 S. Ct. 1328, 25 L. Ed. 2d 615 (1970).

¹⁵ *United States vs. Cherokee Nation*, *supra*, at p. 1489.

"The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject."¹⁶

The Court in *Cherokee* goes on to note that:

"Though *Rands* spoke in terms of riparian owners, rather than those holding fee simple title to riverbed interests, our cases make clear that the navigational servitude is dominant to *riverbed interests no matter how acquired*" (emphasis added).¹⁷

Lambert is not so whimsical as to joust against a recent unanimous decision of this Court. Lambert does, however, ask the Court to *distinguish* the contract right Lambert seeks to enforce from the Fifth Amendment right claimed not only by the Cherokee Tribe in this recent case, but also by *every* party who has ever litigated the government's dominant navigational servitude.

Lambert's claim is contractual, and just is *not* what the *Cherokee* court contemplated as a "riverbed interest no matter how acquired." Lambert's claim for increased costs does *not* flow from its lease with Delta; even if Lambert had no lease with Delta, its contract action for increased costs would remain. Lambert's ouster was occasioned by the Corps' insis-

¹⁶ *United States vs. Cherokee Nation*, *supra*, at p. 1490, quoting *United States vs. Rands*, 389 U.S. 121, 122, 88 S. Ct. 265, 266, 19 L. Ed. 2d 329, (1967).

¹⁷ *United States vs. Cherokee Nation*, *supra*, at p. 1490, n. 3.

tence that Lambert could not have what the Corps' own contract had already given: the sand from "existing streambed."

III. LAMBERT'S PURCHASE ORDER CONTRACT WITH JONES, BY INCORPORATION OF PROVISIONS IN THE CORPS OF ENGINEERS' PRIME CONTRACT, VESTS LAMBERT WITH THE RIGHT TO EXCAVATE SELECT SAND FROM THE DISPUTED SANDBAR; THE REACH OF THE FEDERAL NAVIGATIONAL SERVITUDE HAS NEVER ENCOMPASSED SUCH CONTRACT RIGHTS.

Lambert's Purchase Order contract to supply "select sand material" incorporates all applicable provisions of Jones' prime contract with the Corps. A provision contained in the Specifications clearly details the quality and source of such material contemplated by the contract:

"5.4 *Select Sand Material.* Select sand materials for use in the backfill for the lock and dam shall classify as SW or SP by the Unified Soil Classification System and shall be clean, free draining, and containing no more than 5 percent material by weight passing the No. 100 sieve. *Sand from the existing streambed may not meet these requirements without processing and may have to be obtained from offsite sources both at the contractor's expense*"
(emphasis added).¹⁸

The above emphasized portion of Paragraph 5.4 is an express caveat to the supplier of select sand that materials from "existing streambed" (i.e. sand within the rights-of-way shown on the plan drawings) "may not" be qualitatively

¹⁸ Paragraph 5.4 of Division 2, Section 2D (BACKFILL AND EMBANKMENT) of the Specifications, as augmented by Amendment 0003.

acceptable, and that if not, then the supplier may have to procure offsite materials at its own expense. But implied in that possibility is the certainty that, if onsite select sand materials are qualitatively acceptable, then the contract makes them available for use in supplying the project.

It is undisputed that, for nine months, both Jones and the Corps of Engineers condoned Lambert's production of select sand backfill from the disputed sandbar. Lambert in fact produced 25,000 tons of material from the disputed sandbar prior to its ouster, none of which was rejected by Jones as unsuitable, and all of which was incorporated into the project. The very contract which the Corps drafted, and which the Lambert-Jones contract incorporated, granted Lambert the right to excavate suitable sand from this sandbar in the "existing streambed."

Lambert cannot perceive, under standard rules of grammar, and in accordance with the ordinary sense of the English language, any other construction for this provision. Even if deemed ambiguous, however, Paragraph 5.4 should be construed against the drafter and in Lambert's favor. *Lance Roof Inspection Service, Inc. vs. Hardin*, 653 F. Supp. 1097, 1102 (S.D. Tex. 1986); *Otto Candies, Inc. vs. McDermott International, Inc.*, 600 F. Supp. 1334, 1340 (E.D. La. 1985), aff'd. 785 F.2d 1033 (5th Cir. 1986); and *Zapata Marine Service, Inc. vs. O/Y Finn Lines, Ltd.*, 571 F.2d 208, 209 (5th Cir. 1978).

Interpretation of this provision of the contract is certainly a material question which cannot be summarily determined by reference to the federal navigational servitude.

The Purchase Order supply contract between Lambert and Jones gives Lambert the right to extract sand from available onsite sources, such as the disputed bar. The contract is thus not "silent" as to available sources of sand. The Court of

Appeals erred in holding that the contract was silent, and therefore in finding that Lambert's right to an equitable adjustment for additional costs occasioned by wrongful dispossess "cannot arise from the Lambert contract."¹⁹

The novelty of the Fifth Circuit's holding is that no court has ever held that the valid contract of a supplier with a government contractor is subject to unilateral amendment by imposition of the federal navigational servitude. No reported case in the jurisprudence permits this servitude to clothe the government (or its general contractor) with power to defeat contract rights which the government itself conferred. Absolutely without exception, the cases in which the servitude has been invoked concern the established principle that *owners* of submerged lands within navigable waters take their *riparian property rights* cognizant of the dominant servitude.²⁰

Should this Court affirm that Lambert's valid contract claim is vanquished by the power of the navigational servitude, it would frustrate the important *policy considerations* which underlie public works contracts. If allowed to stand, the Fifth Circuit's decision in this case will toll the first indication that the navigational servitude poses danger to a supplier's valid contract rights, and will effect an unprecedented expansion of federal power troubling to contractors whose work requires frequent use of borrow materials in submerged lands. Such a policy would cloud every project with the "spectre" of the servitude, and would undermine the public bidding process. Contractors will simply be unable to rely upon cost factors figured into their bids if there lurks a possibility that the

¹⁹ Supra, at n. 11.

²⁰ E.g., see *Gibson vs. United States*, 166 U.S. 269, 17 S. Ct. 578 (1897); *Scranton vs. Wheeler*, supra at n. 8; and *United States vs. Virginia Electric and Power Company*, supra at n. 9.

sovereign will exercise its dominant servitude to evict the contractor from a borrow source on which he chooses to rely.

Paragraph 5.4 constitutes the law between, and is binding upon, Jones and Lambert as the contracting parties; the courts are bound to give legal effect to such agreements according to the true intent of all the parties.²¹

Despite this precept, the Court of Appeals has condoned Jones' theory that the navigational servitude exculpates it entirely from Lambert's claim for increased costs. This is a non sequitur. The navigational servitude is the power of the federal government to take and use materials from the banks of a navigable stream *without payment of Fifth Amendment just compensation to the owner of the bank*. It has nothing to do with a third party's government supply contract; and this claim has nothing to do with Fifth Amendment compensation.

This distinction alone renders nugatory every case cited by Respondents in the courts below as authority for their contention that the servitude defeats Lambert's Miller Act claim. The jurisprudence is eloquent in its silence.

In three cases relied upon by Jones in support of its motion for summary judgment in the District Court, the government invokes the servitude to defeat claims of *riparian owners* for the incremental value of their uplands attributable to its potential as a power plant site.²² These cases stand for the dominance of the navigational servitude over the value a

²¹ See *Barton vs. Jumonville*, 528 F. Supp. 887, 890 (M.D. La. 1981), aff'd. 699 F.2d 242 (5th Cir. 1983); and *Rivercity vs. American Can Company*, 600 F. Supp. 908, 916 (E.D. La. 1984), aff'd. 753 F. 2d 1300 (5th Cir. 1985). See also La. Civil Code art. 1983.

²² See *United States vs. Twin City Power Company*, 350 U.S. 222, 76 S. Ct. 259 (1956) reh. den.; *United States vs. Grand River Dam Authority*, 363 U.S. 229, 80 S. Ct. 1134 (1960); and *United States vs. Virginia Electric and Power Company*, *supra* at n. 9.

riparian owner derives from the "flow of the stream." They do *not* pertain to Lambert, a contracting third party.

In three other cases cited by Jones, the court denies compensation to *riparian owners* for losses occasioned by government-built structures. In *South Carolina vs. Georgia*,²³ the servitude was invoked to permit construction of a crib dam which blocked the flow of the Savannah River on the South Carolina side of a midriver island, thus destroying that State's valuable use of its property as a harbor. In *Gibson vs. United States*,²⁴ the private owner of an island complained unsuccessfully that the dock from which she shipped her island-grown produce to market was made inaccessible by the government's construction of a dike. In *United States vs. Chicago, M., St. P. & P. R. Co.*,²⁵ the navigational servitude was the authority by which this Court denied a railroad compensation for inundation of its rail right-of-way below the ordinary high water mark due to construction of a series of locks and dams. The railroad's status as a riparian owner was stipulated.²⁶ In all three cases, the servitude permitted the government to avoid payment of just compensation to *riparian owners*. Again, this does *not* apply to Lambert, a third party seeking to enforce a right granted by the government in a contract drafted by the government.

In *United States vs. Rands*,²⁷ a riparian owner was denied compensation for the value of his land for use as a park and port. In *Allen Gun Club vs. United States*,²⁸ the Corps of

²³ 93 U.S. 4 (1876).

²⁴ Supra, at n. 20.

²⁵ 312 U.S. 592, 61 S. Ct. 772 (1941).

²⁶ See 312 U.S. 592, 595, 61 S. Ct. 772, 774.

²⁷ Supra, at n. 16.

²⁸ 180 Ct. Cl. 423 (1967).

Engineers, in order to relieve flooding of nearby farmlands, cut a ditch across some property contiguous to the plaintiff's wetlands. Siltation caused by this ditch eventually filled in these neighboring wetlands, causing a loss to plaintiff of their value as fishing and duck hunting grounds. The court invoked the navigational servitude to deny compensation to the owner of the ruined property.

In *Zabel vs. Tabb*,²⁹ riparian owners were denied a permit to dredge and fill (and thus improve the value of) their submerged wetlands for the purpose of constructing a trailer park. This denial, and the loss of value it occasioned, was condoned without compensation to the *riparian owner* because of the federal navigational servitude.

Jones relied most heavily in the District Court on the case of *Coastal Petroleum Company vs. United States*.³⁰ Careful reading of the opinion discloses that plaintiff, a lessee, stood in the shoes of a *riparian owner* seeking Fifth Amendment just compensation for loss of a valuable mineral. The District Court also cited this case to refute Lambert's position, but was completely silent on the issue of whether *Coastal Petroleum* permitted a third party's contract rights to be impaired.³¹

Again, Lambert pleads its cause to enforce valid contract rights under its Purchase Order with Jones, not for Fifth Amendment just compensation as the owner or lessee of the disputed sandbar. The plaintiff in *Coastal Petroleum* was just a lessee, standing in the shoes of the owner, and did not have Lambert's additional status of "third party government contract supplier." The case is therefore inapposite.

²⁹ 430 F.2d 199 (5th Cir. 1970) reh. den.

³⁰ 524 F.2d 1206 (Ct. Cl. 1975)

³¹ See Ruling, at pp. 15a-17a in the Appendix.

The court in *Cherokee*³² observed of the decision in *Choctaw Nation*³³ that it notes the United States had no interest in retaining title to the submerged lands because “it had all it was concerned with in its *navigational easement* via the constitutional power over commerce” (emphasis added).³⁴ The *Cherokee* court further noted that:

“The parties, including respondent here, clearly understood that the navigational servitude was dominant no matter how *the question of riverbed ownership* was resolved” (emphasis added).³⁵

Lambert does not present the “question of riverbed ownership” for this Court’s review. It is undisputed that Delta owned the sandbar at issue in this case; nor does Lambert dispute its leasehold interest in that sandbar. The *quite different question* this case presents, however, is whether Lambert’s separate capacity as a sand supplier to the lock and dam project vests it with contractual rights conferred by the government’s own contract, which cannot be impaired by imposition of the navigational servitude.

The crucial issue here is not, as in *Cherokee*, whether congress “surrendered” the servitude but rather whether this Court will let stand an Appeals Court decision which expands the government’s dominant navigational servitude beyond the scope intended by the framers of the United States Constitution.

³² *Supra*, at n. 13.

³³ *Supra*, at n. 14.

³⁴ *Choctaw Nation*, *supra*, 397 U.S. at p. 635, 90 S. Ct. at p. 1337.

³⁵ *Cherokee Nation*, *supra*, 107 S. Ct. at p. 1491.

IV. THE CONTRACT DOCUMENTS DO NOT EVIDENCE AN EXCLUSIVE RESERVATION OF MATERIALS ON THE DISPUTED SANDBAR FOR USE AS CLOSURE DAM FILL; AND THEREFORE DO NOT COMPRIZE SUFFICIENT NOTICE TO LAMBERT NOT TO EXCAVATE THESE MATERIALS.

At the heart of this controversy is whether Jones' removal of Lambert from the disputed sandbar was justified by Plan Drawing 3/1 (App., p. 61a). The drawing in question was part of a section of the plans detailing "Borings" (see "LEGEND" at App., p. 62a), and identified the location of test borings at this and other borrow areas on the project site. The drawing also shows the disputed sandbar enclosed in a "box," inside which are the words, "Borrow Area for Closure Dam (sand fill)" (App., p. 63a).

Lambert has rightly contended from the outset that the drawing merely identifies types of deposits at various points along the banks of the oxbow for use in producing fill in accordance with varied specifications for different parts of the project. Lambert argues that the language in the "box" further identifies sand suitable for closure dam fill, but is inadequate notice of, and does not constitute, an *exclusive reservation* of the sandbar for that purpose.

Jones' position has been that the language contained in the "box" reserved the disputed sandbar for Jones' exclusive use in providing closure dam fill, a part of the project for which Lambert was not the supplier. The difference between Jones' position and Lambert's clearly presents a material factual issue which *precludes summary determination* without trial.

Both lower courts erred by regarding this factual issue as "legally immaterial."³⁶ The Court of Appeals seems even to

³⁶ Note 10 of the Fifth Circuit Opinion, 835 F.2d, at p. 1112 (App., pp.

have already decided this factual question *against* Lambert and in favor of Jones.

In the Fifth Circuit's recitation of facts, the plan drawing is construed to show the disputed bar as "blocked by a right-of-way line," and as a "reserved 'borrow area.'" ³⁷ The Fifth Circuit Opinion also implies that Lambert has conceded the issue by an "admitted awareness of the area's designation as a 'Borrow Area for Closure Dam.'" ³⁸ The record is devoid of any such admission by Lambert.

These are errors which obfuscate material issues of fact sufficient for denial of Jones' motion for summary judgment in the District Court. Lambert not only derived its right to use the disputed sandbar from its contract with Jones, but also was not put on notice by any of the contract documents, specifically not by Plan Drawing 3/1, that the sand was reserved for exclusive use as fill for the closure dam.³⁹ This basic difference in interpreting the contract documents is the very crux of this dispute, and cannot be considered "immaterial" such as to justify summary judgment.

Lambert's claim for increased costs and equitable adjustment of the contract is a claim arising under the contract which simply does not permit relief by reference to the navigational servitude. The claim arises from Jones' refusal to permit delivery of materials from a site which the purchase

37a-38a), states: ". . . the District Court went on to conclude, however, that the resolution of this factual dispute was not material to its holding. We agree . . ."

³⁷ *Lambert Gravel Company, Inc. vs. J. A. Jones Construction Company*, supra, at p. 1107 (App., p. 27a).

³⁸ *Lambert Gravel Company vs. J.A. Jones Construction Company*, supra, at p. 1111 (App., p. 37a).

³⁹ See Affidavit of Philip Beard, P.E., App., pp. 65a-67a, Lambert's expert in drafting and interpretation of government contracts.

order permits. The clear issue of material fact between Jones and Lambert as to this claim is whether or not the Purchase Order, and contract documents incorporated therein, forbid or exclude the disputed sandbar as a source of supply for the "select sand backfill" to be furnished to the project by Lambert.

CONCLUSION

Petitioner recognizes the dominant power of the federal navigational servitude which emanates from the Commerce Clause of the United States Constitution, as well as the need for national regulation of navigable waterways as unobstructed highways of commerce between the states. However, this power has *always* in the past been exercised to overcome competing property interests *only* of riparian landowners. In every case where there is a navigational purpose, the government has used the servitude solely to supersede the Fifth Amendment requirement of just compensation for deprivation of property.

The power of the United States under the federal navigational servitude should not now be expanded to permit a government contractor of a public work to impair contractual rights conferred on its supplier by provisions in the sovereign's own contract. Such a holding will undermine the public bidding process, on which the entire construction industry has rested for more than a century.

Respectfully submitted,

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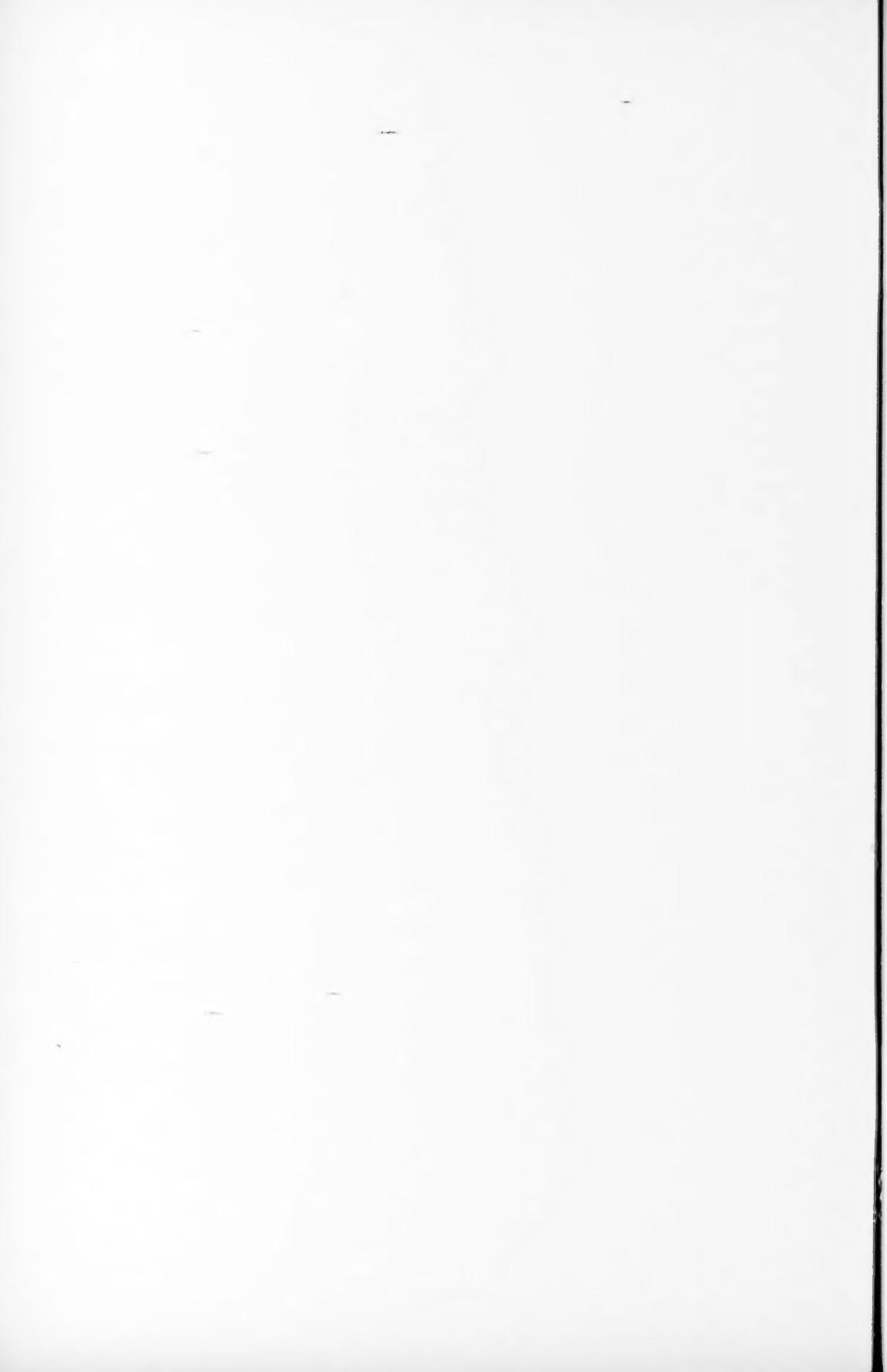
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**APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**



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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

LAMBERT GRAVEL COMPANY, INC.
VERSUS
J.A. JONES CONSTRUCTION COMPANY, ET AL.

CIVIL ACTION NO. 84-1951

(Entered April 3, 1986)

RULING

This suit involves a dispute under the Miller Act, 40 U.S.C. §270(a) *et seq.*, as well as a contract and breach of warranty claim by Lambert Gravel Company, Inc. (Lambert) against J. A. Jones Construction Company (Jones). Jones, a general contractor, was engaged by the Army Corps of Engineers (Corps) to construct Phase III of Lock and Dam No. 1 of the Red River Waterway Project. Lambert was a subcontractor of Jones.

In December of 1979, Jones contracted with the Corps to construct a portion of the elaborate and massive lock and dam improvements on the Red River. All provisions of the con-

tract, its specifications, maps and drawings were incorporated by reference in an agreement between Jones and Lambert. The substance of that July of 1980 agreement between Jones and Lambert required Lambert to supply select sand to Jones for use in the construction project. The construction of the dam required the use of material including select sand and channel closure material, the latter being a sandy substance which can be extracted from the bed of Red River. Areas in the Red River below the high water mark were reserved by the Corps in the plans and specifications for the extraction of closure material. These are referred to as "borrow" areas. The specific language of reservation employed by the Corps was "Borrow Area for Closure Dam (sand fill)." The authority for making such a reservation is described in some detail later in this Ruling. Lambert was not to supply channel closure material, only select sand.

Lambert contracted with Louisiana Delta Plantation (Delta) to acquire select sand in order to fulfill its contract with Jones. Delta owned a sandbar which was below the high water mark and above the low water mark of Red River. The sandbar contains select sand and channel closure material and was marked as a reserved area in the attachments to the Jones-Corps contract, which contract, as we have said, was incorporated by reference in the Jones-Lambert contract.

After nine months of sand removal by Lambert from the sandbar, the Corps notified Jones that Lambert's activities in the reserved area were unauthorized.¹ As ordered by the

¹ The Corps' letter to Jones read as follows:

"Gentlemen:

Your sand supplier (Lambert Sand and Gravel Company) and your own forces have been using a borrow area contrary to what is contained in your contract.

The borrow area in question is a sand bar located in the river

Corps, Jones informed Lambert to terminate its removal of sand from the reserved area, which included the Delta sandbar.² Lambert, under protest, withdrew from the area and

approximately 1 to 2 miles downstream from the old dredge disposal area, on the left descending bank of the river. In accordance with drawings 1/2 and 3/1, the material in this borrow area is to be used for the Closure Dam. Contrary to the drawings you and your supplier are using this material for something other than the Closure Dam.

We understand that Lambert has stated that they obtained the right to the material from Louisiana Delta Plantation. If this is true, then it is wrong for the following reason: The bottom of the river up to the ordinary high water line belongs to the State of Louisiana and not to Louisiana Delta Plantation. The State of Louisiana has already given this material to the Federal Government for a specific use (the Closure Dam). No use can be made of this material except for the Closure Dam.

Therefore, you and your supplier are to cease operations immediately in this area."

The facts are disputed as to whether the Corps, by designating the borrow area for channel closure material, intended to exclude all other extracting activities not related to the channel closure dam operation. The resolution of this factual dispute is not material to the Court's holding.

The Corps' reasoning in paragraph 2 as to why Lambert does not have a right to use the Delta sandbar is incorrect. The federal navigation servitude is the reason Lambert does not have a right to extract sand. The Corps' error, however, does not preclude the government from asserting the navigation servitude. "[I]t is well established that the Government is not bound by the unauthorized or incorrect statement of its agents." *Hicks v. Harris*, 606 F.2d 65 (5th Cir. 1979).

² The Jones letter to Lambert read as follows:

"Reference is made to recent phone conversations with your Mr. Bamber relative to your dredging operation on the Red River near the Lock and Dam #1 site. When you first discussed the possibility of taking sand from the bars on the Red River, Mr. Ligon gave you contract drawings showing the Corps of Engineer's [sic] designated borrow area. At this time you were told that the material inside the boundaries delineated on contract drawing 3/1 could not be used since it was designated as fill for the

begin [sic] searching for another source of sand. Lambert eventually located another sand source, but at a substantially increased cost over that which it was paying to Delta.

Lambert filed this suit for monetary damages basing its recovery on three separate theories. First, Lambert wants \$7,625.81 for materials which it removed from the Delta sandbar and delivered to Jones and for which it was not paid. Lambert also asks for \$20,812.50 which is the retainage held by Jones to which Lambert is entitled irrespective of the outcome of the third element of its claim. That third element is a quest for recovery for the increased costs incurred as a result of having to locate another select sand source after eviction from the Delta sandbar. Specifically, Lambert claims \$720,328 for increased production costs and \$1,432,820 for use of additional equipment.

Both Lambert and Jones move for partial summary judgment. The motions involve only the claims for increased production costs and use of additional equipment. In other words, the retainage and unpaid invoice claims are not included in the partial summary judgment motions. The crux of Jones' motion is that the United States Government possesses a federal navigation servitude over the disputed sandbar. Therefore, the Government, argues Jones, had the right to evict Lambert from the sandbar and Jones cannot be held responsible for damages suffered by Lambert as a result of the eviction. Lam-

upstream closure dam. It has recently come to my attention that your dredge has crossed over the boundary lines into the designated borrow area. The material that you are dredging has been obtained by the Corps of Engineers for a specific use. You do not have nor have you requested permission from the government or J.A. Jones to remove this material. We have no alternative but to direct you to stop removing this sand immediately and seek suitable material from other sources."

bert rebuts by arguing that the servitude does not apply to this sandbar because Congress did not intend to rely upon the federal navigation servitude for the Red River project. Lambert argues in the alternative that even if the servitude applies, the Corps agreed not to exercise a servitude with respect to the disputed sandbar. In short, Lambert contends that the Corps was without capacity to cause eviction from the sandbar and therefore Jones breached its contract with Lambert by refusing to accept sand from the disputed sandbar. This is the critical issue to be decided by this judgment. As summarized by Lambert in its brief, "the present action hinges upon the right of Lambert to take sand from the sandbar in order to fulfill its contractual obligations to Jones . . ." (Plaintiff's Memorandum in Support of Cross-Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment, p. 53).

Rule 56 of the Fed. R. Civ. P. sets forth the ground rules applicable to the summary judgment game:

Summary judgment may be granted only if it appears from the pleadings, depositions, admissions and affidavits, considered in the light most favorable to the non-moving party, that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Buchanan v. Stanships, Inc., 744 F.2d 1070, 1073 (5th Cir. 1984).

The navigation servitude, often referred to as a "dominant servitude," is a privilege conferred upon the United States Government through the Commerce Clause. The navigation servitude allows the government to appropriate without compensation. The privilege extends to lands below the ordinary

high water mark of a navigable river. *United States v. Twin City Power Company*, 350 U.S. 222 (1956); *United States v. Virginia Electric Power Company*, 365 U.S. 624 (1961); *United States v. Rands*, 389 U.S. 121 (1967). "The power is a dominant one which can be asserted to the exclusion of any other competing or conflicting one." *Virginia Electric & Power Company*, 365 U.S. at 628. "[O]wners of property or property rights within navigable waters takes [sic] those rights fully cognizant of their limited nature." *Coastal Petroleum Company v. United States*, 524 F.2d 1206 (Ct. Cl. 1975).

The parties agree that the disputed sandbar lies below the ordinary high water mark of the Red River. It is clear, therefore, that the sandbar is susceptible of being burdened by the navigation servitude. Determining whether the Delta sandbar is actually burdened with the navigation servitude hinges on two factors. First, did Congress intend to forego the federal navigation servitude on the Red River project? Second, if it did not, did Congress delegate authority to the Corps to consent to encroachment on the navigation servitude?

Congress may decide not to assert the navigation servitude.

Congress may, of course, decide in a particular case not to rely on the servitude, but rather to compensate owners of submerged land in navigable waters for actions which, like those to which the servitude is applicable, are grounded in the power of the Federal Government to regulate commerce. (citations omitted). But where a project has a legitimate navigation purpose, and there is no ascertainable congressional intent to pay compensation, the presumption is that Congress intended to exercise both its navigation power and the navigation servitude.

Coastal Petroleum, 524 F.2d at 1210.

In *United States v. Gerlach Livestock Company*, 339 U.S. 725 (1950), the Court found that Congress did not intend to assert the navigation servitude.

Congress elected not "to in any way interfere with the laws of any state . . . relating to control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder." (citation omitted). We cannot twist these words into an election on the part of Congress under its navigation power to take such water rights without compensation.

Id. at 739.

Lambert argues that Congress did not intend to rely on the navigation servitude in securing the property rights necessary for the Red River project. Congress authorized the Red River project with the passage of Public Works — Rivers and Harbors, Pub. L. No. 90-483, 82 Stat. 731 (1968). The act provides that "[t]he provisions of section 1 of the River and Harbor Act approved March 2, 1945 (Pub. L. Numbered 14, Seventy-ninth Congress, first session), shall govern with respect to projects authorized in this title . . ." Lambert contends that Public Law 14 signifies congressional intent not to apply the servitude to the Red River project. Lambert specifically relies on the following language:

In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is hereby declared to be the policy of the Congress to recognize the interests and rights of the states in determining the development of the watersheds within their borders and like-

wise their interests and rights in water utilization and control . . .

This language does not express congressional intent to forego the navigation servitude. The language only recognizes the "interest and rights" of states in determining the development of watersheds and in water utilization and control. Public Law 14 makes it clear that Congress did not want to preclude state involvement in water development projects.

Public Law 90-483 also specifies that the Red River project is to be "prosecuted under the direction of the Secretary of the Army and supervision of the Chief of Engineers, in accordance with plans and subject to the conditions recommended by the Chief of Engineers" in House Document Numbered 304, Ninetieth Congress. House Document 304 establishes that local interests, at no cost to the federal government, are to provide lands, easements, and rights-of-way required for the Red River project. Louisiana created the Red River Waterway Commission to provide necessary lands, easements and rights-of-way to the federal government. La. Rev. Stat. Ann. §34:2301 *et seq.* (West 1985). This congressional reliance on local interests, however, is not a waiver of the navigation servitude. Congress simply instructed local interests to acquire rights which the United States Government did not already possess. The Department of Army's Real Estate Handbook, 32 C.F.R. 644.2 (1984), supports this reasoning. The Handbook describes the Corps' procedures to be followed in the acquisition of land for civil works. Subsection C provides in part:

- (c) *River and Harbor and Flood Control Projects -*
 - (1) *River and Harbor Projects.* The Act of Congress approved April 24, 1888 (32 U.S.C. 591) authorizes

acquisition of land for river and harbor purposes. These include construction, operation, maintenance and improvement of both natural and artificial waterways, the construction of locks and dams, dikes, bulkheads, jetties, revetments and other bank protection works, and spoil disposal dikes and retaining structures for construction and maintenance. Unless otherwise specified by Congress, local interests furnish, free of cost to the United States, all lands, easements and rights-of-way required for initial construction, operation and subsequent maintenance.

Subsection D provides in part:

(d) *The Navigational Servitude.* As a general rule the United States does not acquire interests in real estate which it already possesses or over which jurisdiction is or can be legally exercised. Irrespective of the ownership of the banks and bed of a stream below ordinary high water mark, and irrespective of the western water rights under the prior appropriation doctrine, no further Federal interest is required for navigation projects in navigable streams below the ordinary high water limit. It is required, therefore, that the acquisition plan consider the extent of the navigational servitude.

Unless Congress otherwise orders, local interests are called upon to furnish lands, easements and rights-of-way to the United States Government. Subsection (d) illustrates that the delegation of these duties to local interests does not compromise the federal navigation servitude.

Congress need not completely renounce the navigation servitude. Congress can authorize the Corps to waive the navigation servitude. In *United States v. Stoeco Homes, Inc.*, 498

F.2d 597, 610 (3d Cir. 1974), the court found that “[S]ection 10 [of the Rivers and Harbors Appropriation Act] by its plain language contemplates congressional consent to some encroachments on the navigational servitude, and delegates to the Army Corps of Engineers and the Secretary of the Army authority to grant such consent on its behalf.” In *United States v. 119.67 Acres of Land, More or Less, Situated in Plaquemines Parish, State of Louisiana, et al.*, 663 F.2d 1328 (5th Cir. 1981), the Fifth Circuit found congressional authority for the Corps to allow encroachments through two analytical techniques. First, “[s]ince Congress appropriated money to acquire easements, we may assume, impliedly, that Congress gave the Secretary of the Army the discretion to provide for deposit of spoil instead of asserting the navigational servitude.” *Id.* at 1337, n. 10. The Court cannot find, nor did Lambert cite, any authority evincing congressional intent to pay for use of the disputed sandbar.

Second, the court in *119.67 Acres* held that “[f]aced with this elusive question of fact, it is reasonable to conclude that as in *Stoeco*, *supra*, the Secretary of the Army has congressional authority to consent to what might be an encroachment on the navigational servitude.” *Id.* at 1335. The elusive question of fact confronting the Fifth Circuit was whether the land in controversy was subject to the navigation servitude. The land in controversy was marsh land adjoining the Mississippi River. It was unclear at exactly what point the navigation servitude began or ended. No such elusive question of fact exists in the instant matter which would lead the Court to conclude that the Corps has congressional authority to consent to encroachments. The parties agree that the disputed sandbar is susceptible of being burdened with a navigation servitude because it lies below the high water mark of the Red

River. In short, Congress did not delegate to the Corps the authority to consent to encroachments on the federal navigation servitude.

Finding no such congressional intent to forego the servitude and no congressional authority to allow the Corps to surrender the servitude, the court must now analize [sic] this case in light of *119.67 Acres*. In *119.67 Acres*, the Fifth Circuit held that the United States Government, through its authorized representatives, had surrendered its navigation servitude. The court found that once the government surrenders the servitude, it cannot later void the agreement and reinstate the servitude. The court felt that “[t]here must come a point at which citizens can depend upon the promises of the United States with regard to their own and the Government's property rights.” *Id.* at 1336.

Lambert argues that the instant facts are analogous to the facts of *119.67 Acres*. Lambert contends that the Corps surrendered the navigation servitude in 1977 by consenting to a sales contract between the Red River Waterway Commission and Delta. Delta owned a large tract of land on the Red River which the Corps needed for the lock and dam project. The Red River Waterway Commission negotiated with Delta to acquire the needed land. Delta ultimately agreed to sell land to the Red River Waterway Commission, but only under certain conditions. One condition provided:

Louisiana Delta Plantation would like assurance that the remaining lands south of the proposed Lock and Dam cut-off remain the property of Louisiana Delta Plantation and will not be taken by expropriation at a later date.

Lambert argues that the Corps consented to this condition, and by doing so, waived the navigational servitude on this

land. According to Lambert, the disputed Delta sandbar is "lands south of the proposed Lock and Dam cut-off," meaning the Corps waived any right to assert the navigational servitude over the Delta sandbar. Lambert also argues that its subsequent lease with Delta vested Lambert with exclusive rights to the sandbar. Lambert concludes that the Corps cannot now ignore its waiver of the servitude and invoke the servitude to force eviction from the Delta sandbar.

119.67 Acres does not support Lambert's position, even if the court assumes that Lambert's interpretation of the events surrounding the Delta land sale is correct, i.e., the Corps purported to waive the navigational servitude on the Delta sandbar.³ Lambert's argument has ignored an essential proposition underlying the *119.67 Acres* decision. The Fifth Circuit found that the Secretary of Army had congressional authority to consent to encroachments on the navigation servitude.⁴ No such congressional authority can be found in the instant matter. Without congressional authority, the Corps cannot consent to an encroachment on the federal navigation servitude.

"[A]nyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Gov-

³ Jones denies that the Corps intended to waive the navigational servitude over the Delta sandbar. Jones argues that (1) the Delta sandbar is not land "south of the proposed Lock and Dam cut-off," (2) the condition does not waive the navigational servitude and (3) the Corps never agreed to the condition.

⁴ "[I]t is reasonable to conclude that as in *Stoeoco, supra*, the Secretary of the Army has congressional authority to consent to what might be an encroachment on the navigational servitude," *119.67 Acres*, 663 F.2d at 1335.

"Since Congress appropriated money to acquire easements, we may assume, impliedly, that Congress gave to the Secretary of the Army the discretion to provide for the deposit of spoil instead of asserting the navigational servitude. *Id.* at 1336, n. 10.

ernment stays within the bounds of his authority." (citation omitted). "The United States are neither bound nor estopped by the acts of their officers and agents in entering into an agreement or arrangement to do . . . what the law does not sanction or permit . . . [T]hose dealing with an agent of the United States must be held to have had notice of limitation of his authority." (citation omitted) . . . This circuit has unambiguously recognized that "an estoppel [does not] arise through an act of representation by an officer or agent without authority to act for the government in the premises," (citation omitted), so that "[r]egardless of the strong moral implications, it is well established that the Government is not bound by the unauthorized or incorrect statement of its agents."

Hicks v. Harris, 606 F.2d 65 (5th Cir. 1979). In *119.67 Acres*, the government officials were acting within the scope of their authority as conferred by Congress when they consented to the encroachment. In the instant matter, the Corps, if it purported to waive the servitude, was acting without congressional authority.

Kaiser Aetna v. United States, 444 U.S. 164 (1979), a leading Supreme Court case on the navigation servitude, is also proffered by Lambert as authority to support its position. *Kaiser Aetna* involves the atypical factual scenario of the development of the Kuapa Pond in Hawaii. Historically, the Kuapa Pond was an undeveloped privately owned body of water separated from navigable water (Maunalua Bay) by a barrier beach. The pond's maximum depth at high tide was two feet.

In 1961, Kaiser Aetna leased the pond for development of a marina-style subdivision. Kaiser Aetna notified the Corps of

its plans. Kaiser Aetna invested millions of dollars to convert the pond into a navigable marina. Once developed, it controlled access to and use of the marina by charging fees to the users of the marina.

In 1972 a dispute arose between Kaiser Aetna and the corps. The Corps argued that Kaiser Aetna could not deny public access to the marina because, as a result of the improvements, the marina had become a navigable body of water. As navigable water, argued the Corps, the pond became subject to the federal navigation servitude. The navigation servitude, concludes the Corps, gave the public a right of access to the once private pond.

The Supreme Court disagreed with the Corps' argument.

[W]hat petitioners now have is a body of water that was private property under Hawaiian law, linked to navigable water by a channel dredged by them with the consent of the Government. While the consent of individual officials representing the United States cannot "estop" the United States (citations omitted), it can lead to the fruition of a number of expectancies embodied in the concept of "property" — expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the land-owner's property.

Id. at 179. The Supreme Court held that the government must pay Kaiser Aetna just compensation if it wishes to turn the marina into a public aquatic park.

Lambert argues that the Delta land sale, as discussed above, led "to the fruition of a number of expectancies embodied in the concept of property." Specifically, Lambert contends that the condition reserving all lands south of the proposed Lock and Dam cut-off led to the fruition of a number of expec-

tancies, including Delta's right as owner to permit Lambert, as lessee, to extract select sand.

This Court does not agree with Lambert's reliance on *Kaiser Aetna*. *Kaiser Aetna* involves a situation in which huge expenditures of private capital converted a private pond into a navigable marina. Once the conversion was completed, the government, relying on the navigation servitude, tried to invade private ownership rights and open the marina to the public. "[T]he Government's attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation or improvement of navigation as to amount to a taking . . ." *Id.* at 178. Such is not the case in the instant matter. Delta is a typical riparian landowner whose property lying below the high water mark of a navigable river is subject to the navigation servitude.

Coastal Petroleum, 524 F.2d at 1206, is analogous to the instant matter. Coastal held a mineral drilling lease to the water bottoms of Lake Okeechobee. The Corps constructed a levee on the lake. Coastal filed suit alleging that the building of the levee resulted in a Fifth Amendment taking of its property. Specifically, Coastal asserted that the United States prevented it from mining limestone and the United States was mining limestone which belonged to Coastal.

The court granted summary judgment in favor of the United States on Coastal's claim relating to its inability to mine the limestone.

Once we have determined that the navigation servitude applies to this project, it is obvious that Coastal need not be compensated for loss of its right to take the stone under and near the levee Since any right to mine was subservient to use of the property by the Federal Government in aid of naviga-

tion, the Corps of Engineers could, without compensation, preempt the use of the lake bottom to support the levee rather than allow it to be used for mining.

The court also granted summary judgment in favor of the United States on Coastal's claim based on the government taking its limestone.

When the Corps decided to use limestone found below ordinary high water within the navigable waters in order to build the levee, there was "not an invasion of any private property right in such lands for which the United States must make compensation. The damage sustained resulted not from a taking of the owner's property in the streambed, but from the lawful exercise of a power to which the property has always been subject." (citations omitted). No payment had to be made. "[T]he Congress, and those to whom it has delegated authority, may, without Fifth Amendment liability, employ land submerged under navigable water in the way that in their best judgment helps to accomplish the overall purpose even if, intentionally or not, they impair navigation for some purposes in some areas." (citation omitted).

The present action hinges upon the right of Lambert to take sand from the Delta sandbar. It is undisputed that the Delta sandbar lies below the high water mark on the Red River. Congress did not intend to forego completely the servitude, nor did Congress give the Corps authority to waive the servitude. "The power is a dominant one which can be asserted to the exclusion of any other competing or conflicting one." *Virginia Electric & Power Co.*, 365 U.S. at 628. "[O]wners of property or property rights within navigable waters take those rights fully cognizant of their limited nature." *Coastal Petroleum*, 524 F.2d at 1209. In *Coastal*

Petroleum, the navigational servitude barred a lessee from mining limestone. In the instant matter, the Corps utilized the servitude to bar Lambert, a lessee, from extracting sand from the Delta sandbar. Lambert's right to take the sand from the disputed sandbar is subservient to use of the property by the Federal Government. The Corps could properly preempt use of the sandbar and prohibit Lambert from taking the sand. *Coastal Petroleum*, *Id.* at 1211. Lambert had no right to remove sand from the Delta sandbar in order to fulfill its contractual obligations to Jones. Jones cannot be held liable for damages suffered by Lambert as a result of the Government exercising the navigation servitude.

Accordingly, defendants' motion for partial summary judgment is GRANTED and plaintiff's motion for partial summary judgment is DENIED.

SIGNED in Alexandria, Louisiana on 1 April 1986.

s/F.A. LITTLE, JR.
F.A. Little, Jr.
United States District Judge



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

LAMBERT GRAVEL COMPANY, INC.
VERSUS
J.A. JONES CONSTRUCTION COMPANY, ET AL.

CIVIL ACTION NO. 84-1951

(Entered April 3, 1986)

JUDGMENT

For the foregoing reasons,
IT IS ORDERED that J.A. JONES CONSTRUCTION COMPANY'S motion for partial summary judgment is GRANTED. LAMBERT GRAVEL'S motion for partial summary judgment is DENIED. Lambert's claims for unpaid invoices and retainage balance are not affected by this judgment.

SIGNED in Alexandria, Louisiana on 1 April 1986.

s/F.A. LITTLE, JR.
F.A. Little, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

LAMBERT GRAVEL COMPANY, INC.
VERSUS
J.A. JONES CONSTRUCTION COMPANY, ET AL.

CIVIL ACTION NO. 84-1951 "A"

(Entered December 5, 1986)

PARTIAL JUDGMENT OF DISMISSAL

The foregoing Stipulation of Partial Compromise Agreement considered, and, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, upon determination that there is no just reason to delay Judgment of Dismissal in the captioned cause only as to those claims which have been compromised; the Clerk of this Court is hereby expressly directed to enter this Partial Judgment of Dismissal;

ACCORDINGLY, IT IS ORDERED, ADJUDGED AND DECREED that, pursuant to a Partial Compromise Agreement filed as a Stipulation in the record of this action on the ____ day of November, 1986, and in accordance with its terms and provisions, Judgment is hereby rendered dismissing with prejudice the following claims, and only the following claims, which plaintiff, Lambert Gravel Company, Inc., has asserted in this action:

- A. Lambert's claim for the payment of six unpaid invoices, numbered 266, 267, 15213, 15214, 15215, and 15216, in the sum of \$7,625.81, representing material delivered to Jones for use in the project; and
- B. Lambert's claim for payment of the retainage balance, amounting to \$20,812.50, representing a percentage of the price of materials delivered to Jones for use in the project.

FURTHER, the Court having been advised by the parties that certain claims asserted in this cause have been specifically reserved and excluded from the effect of the Partial Compromise Agreement, it is hereby expressly decreed that those claims are not hereby dismissed, said claims being specifically identified as follows:

1. Lambert's claim for alleged increased costs of materials delivered to Jones for use in the project, including increased production costs amounting to \$720,328.00 and the cost of required additional equipment amounting to \$1,432,820.00, which claim totals \$2,153,148.00; and
2. Lambert's claim for payment by Jones of the unit contract price under Lambert's lease agreement with Louisiana Delta Plantation for the sand allegedly removed from the sandbar by Jones' subcontractor after Lambert

was ordered to cease mining operations on the sandbar,
which claim allegedly amounts to \$6,210,000.00.

Signed this 4th day of December, 1986, in Alexandria, Louisiana.

s/F.A. LITTLE, JR.
United States District Judge
Western District of Louisiana
Alexandria Division

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 87-4008

LAMBERT GRAVEL COMPANY, INC.
Plaintiff-Appellant,
VERSUS
J.A. JONES CONSTRUCTION COMPANY, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Louisiana
(Entered January 7, 1988)

Before WISDOM, GEE and KING*, Circuit Judges.

KING, Circuit Judge:

Lambert Gravel Company, Inc. appeals from the district court's grant of J.A. Jones Construction Company's motion for partial summary judgment on Lambert's claims for an equita-

*Formerly Carolyn Dineen Randall

ble price adjustment and additional costs incurred during the performance of its contract to provide sand and fine concrete aggregate to Jones. Finding no error in the district court's decision, we affirm.

I.

In December of 1979, J.A. Jones Construction Company ("Jones"), a general contractor, entered into an agreement ("Prime Contract") with the United States Army Corps of Engineers ("Corps") to construct a portion of "the elaborate and massive lock and dam improvements on the Red River" in the southern tip of Catahoula Parish, Louisiana ("the Project"). The Project involved the construction of (1) a channel and lock across the neck of an oxbow loop in the river to shorten the river's course for navigation ("Construction Project") and (2) an earthen dam ("Closure Dam") at the upper end of the oxbow loop to close the loop and divert the river through the new channel and lock. In the Prime Contract, Jones was required to backfill the lock structure with a specified quantity of "select sand."¹ In July of 1980, Lambert Gravel Company, Inc. ("Lambert") signed a purchase order contract with Jones ("Lambert Contract") in which it agreed to supply select sand and fine concrete aggregate for the Construction Project.² The Lambert Contract incorporated by reference all the provisions, specifications, maps, and drawings of the Prime Contract.

¹ The Prime Contract specifications defined select sand. Moreover, the specifications stressed that "[s]and from the existing streambed may not meet these requirements without processing and may have to be obtained from offsite sources both at the contractor's expense."

² The Lambert Contract was prepared and dated by Jones on May 12, 1980. Lambert accepted and signed the agreement on July 3, 1980.

The Prime Contract also required Jones to provide sand fill for the Closure Dam after the lock was built. The fill material for the Closure Dam was specified to be "a sandy material from the existing streambed as shown on the drawings and as directed by the Contracting Officer." On the left descending bank of the river in the upper end of the oxbow loop there was a large sand bar ("Disputed Bar") which was shown on the appropriate plan sheets as blocked by a right-of-way line and captioned "Borrow Area for Closure Dam (sand fill)." The Disputed Bar lay below the high water mark of the river. Lambert was aware of the legend printed over the Disputed Bar on the plan sheets.

To fulfill its obligation to provide fill materials, Lambert entered into a surface lease agreement with Louisiana Delta Plantation ("Delta"), the owner of the land riparian to the Disputed Bar. Under the lease agreement, Delta granted Lambert the right to extract sand from the Disputed Bar. Lambert began extracting that sand in August of 1980. Lambert's activities did not go unnoticed and, on May 12, 1981, the Corps notified Jones by letter that Lambert was extracting sand from a reserved "borrow area." The letter stated that "[i]n accordance with [the] drawings, the material in this borrow area is to be used for the Closure Dam. Contrary to the drawings you and your supplier are using this material for something other than the Closure Dam."³ The letter ended by

³ The letter went on to outline the Corps' initial objection to Lambert's agreement with Delta. The letter stated that the Disputed Bar belonged to Louisiana and not to Delta and had been given to the federal government for a specific use—the Closure Dam. Neither party disputes the fact that the Corps' reasoning in this letter was incorrect. The navigational servitude served as the basis of the Corps' objection to Lambert's extraction of sand from the Disputed Bar. We agree with the district court, however, that "[t]he Corps' error . . . does not preclude the government from asserting the navigation[al]servitude." Had

commanding Jones and its "supplier" to cease operations in the area immediately. Jones' project manager wrote Lambert immediately and directed Lambert to stop removing sand from the Disputed Bar and seek suitable materials elsewhere.⁴ Lambert was also furnished with a copy of the Corps' letter. A few days later, Lambert acknowledged receipt of the order directing it to stop removing sand from the Disputed Bar. In its acknowledgement letter to Jones, Lambert protested the order and promised to take legal action against Jones for its "breach of contract." While Lambert agreed to abide by the order, it reserved all legal rights and claims it might have against Jones and stressed its exclusive rights to the sand from the Disputed Bar. That same day, Lambert wrote a similar letter of protest to the Corps. By a letter dated May 29, 1981, Jones offered to "make available to [Lam-

navigation[al] servitude." Had Lambert pursued its suit against the Corps at the time of the eviction, the correct legal argument would have been asserted by the Corps. In the instant case, we are only concerned with the Corps' ultimate right to evict Lambert from the Disputed Bar.

⁴ The letter read as follows:

Reference is made to recent phone conversations with your Mr. Bamber relative to your dredging operation on the Red River near the Lock and Dam #1 site. When you first discussed the possibility of taking sand from the bars on the Red River, Mr. Ligon gave you contract drawings showing the Corps of Engineer's [sic] designated borrow area. At this time you were told that material inside the boundaries delineated on contract drawing 3/1 could not be used since it was designated as fill for the upstream closure dam. It has recently come to my attention that your dredge has crossed over the boundary lines into the designated borrow area. The material that you are dredging has been obtained by the Corps of Engineers for a specific use. You do not have nor have you requested permission from the government or J.A. Jones to remove this material. We have no alternative but to direct you to stop removing this sand immediately and seek suitable material from other sources.

bert] all of the contract rights that exist in [the Prime Contract] to dispute this directive and to file a claim for additional compensation." Lambert declined this invitation to seek legal recourse against the Corps through Jones as prime contractor.

Cognizant of the fact that no further materials would be accepted from the Disputed Bar, Lambert sought and eventually secured an alternate source of materials, approximately seven miles further away. Prior to securing this alternate excavation site, Lambert was forced to procure an interim source of materials, some thirty miles further away, from which to satisfy its obligations under the Lambert Contract. Upon completion of operations, Lambert calculated its additional costs and expenses occasioned by its ouster from the Disputed Bar and served "notice of its damages" on Jones. Lambert claimed to have incurred additional costs in the amount of \$2,153,148.00.

Pursuant to the Miller Act,⁵ Lambert filed a civil action in the United States District Court for the Western District of Louisiana against Jones and its six sureties.⁶ Lambert subsequently filed its "Amended and Supplemental Complaint" on January 17, 1985. As summarized by the district court, Lambert presented four claims: (1) a claim for the payment of six unpaid invoices, in the sum of \$7,625.81, representing materials delivered to Jones which were not paid for ("invoice claim"); (2) a claim for payment of the retainage balance, amounting to \$20,812.50, representing a percentage of the

⁵ 40 U.S.C. §§270a *et seq.*

⁶ Jones' sureties, as listed in Lambert's complaint, were Aetna Casualty and Surety Company, the Travelers Indemnity Company, Stanford Fire Insurance Company, Lumberman's Mutual Casualty Company, Employer's Reinsurance Corporation, and North American Reinsurance Corporation. The sureties are parties to the instant appeal and will be identified collectively with Jones.

price of materials delivered to Jones ("retainage claim"); (3) a claim for alleged increased costs of materials delivered to Jones, including increased production costs amounting to \$720,328.00 and additional equipment costs of \$1,432,820.00, all totalling \$2,153,148.00 ("increased costs claim"); and (4) a claim for payment of the unit contract price under Lambert's lease agreement with Louisiana Delta Plantation for sand allegedly removed from the sand bar by Jones' subcontractor after Lambert was ordered to cease mining operations on the sand bar, which claim amounted to \$6,210,000.00 ("unit price claim").

On September 24, 1985, Jones filed a motion for summary judgment. Lambert responded with its own motion for summary judgment on October 28, 1985. The district court held a hearing on the parties' motions on February 3, 1986. During the hearing, Lambert's counsel correctly pointed out that the invoice and retainage claims would not be affected by either motion. Therefore, the district court treated the motions as ones for partial summary judgment. On April 3, 1986, the district court entered a judgment granting Jones' motion for partial summary judgment. The district court concluded that since the Disputed Sand Bar lay below the high water mark of the river, it was subject to the federal navigational servitude. The district court found that Congress neither intended to forego the servitude completely with respect to the Project, nor authorized the Corps to waive the servitude. Therefore, the Corps had the right in the instant case to bar Lambert from extracting sand from the Disputed Bar. Since Lambert had no right to remove the sand from the Disputed Bar in order to fulfill its contractual obligations to Jones, the district court reasoned, "Jones [could not] be held liable for damages suffered by Lambert as a result of the Government exercising

the navigation[al] servitude." In conjunction with its ruling, the court expressly noted that the retainage and invoice claims remained unaffected.

On August 5, 1986, the district court entered an "Order of Dismissal." Under the order, the district court, "having been orally advised by counsel for the parties that this matter has been settled," dismissed "this action" without prejudice to the right, upon a showing of good cause within sixty days, to reopen it if settlement was not consummated. On December 3, 1986, the parties entered into a "Stipulation of Partial Compromise Agreement." Under this agreement, the parties sought to settle only the invoice and retainage claims. They explicitly reserved all their rights, including but not limited to the right of appeal, as to the other claims which were dismissed by the district court's April 3 interlocutory judgment. On December 4 [sic, December 5], 1986, the district court entered its "Partial Judgment of Dismissal." In that order, the district court, pursuant to Federal Rule of Civil Procedure 54(b), and after considering the parties' compromise agreement, dismissed the invoice and retainage claims. Lambert timely filed notice of appeal from the April 3 grant of partial summary judgment which became a final judgment, since the remaining claims were dismissed pursuant to the settlement arrangement.

II.

On appeal, Lambert argues that: (1) the district court erred by holding that neither Congress nor the Corps had manifested an intent to relinquish the navigational servitude with respect to the Project; (2) the Corps did in fact consent to an encroachment on the navigational servitude in the instant

case; (3) even if the navigational servitude would otherwise apply here to an action between the government and a riparian owner, the district court erred in allowing Jones to assert the servitude as a defense to Lambert's contractual claims against it; and (4) since there was enough fill material on the Disputed Bar to supply both Jones' and Lambert's needs for the project, the district court erred by granting summary judgment because a material issue of fact remained as to whether the Corps intended to exclude all dredging activity on the Disputed Bar except for sand needed to fill the Closure Dam.

III.

At the outset, we must identify the applicable standard of review. "When an appeal is taken from a summary judgment, we review the record under the same standards the trial court applied to determine that summary judgment was appropriate." *Wilson v. United States Fidelity & Guar. Ins. Co.*, 830 F.2d 588, 590 (5th Cir. 1987) (citing *Reid v. State Farm Mut. Auto Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986)). Therefore, we must determine whether the record demonstrates that "there is no genuine issue as to any material fact" and that Jones is "entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see *Galindo v. Precision American Corp.*, 754 F.2d 1212, 1216 (5th Cir. 1985).

The district court analyzed the instant case within the framework of the government's right to assert its navigational servitude over the Disputed Bar. The navigational servitude is a dominant servitude which extends to all lands below the ordinary high water mark of the navigable river. *United*

States v. Cherokee Nation of Oklahoma, 107 S. Ct. 1487, 1490 (1987). As the Supreme Court noted in *Cherokee Nation*:

The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject.

Id. (quoting *United States v. Rands*, 389 U.S. 121, 122 (1967)). The Disputed Bar is in the bed of the Red River below the ordinary high water mark. It is clear, therefore, that the Disputed Bar is susceptible to being burdened by the navigational servitude. Lambert argues, however, that Congress "manifested a definite intent to surrender the federal navigational servitude" on the Project. Moreover, Lambert contends that Congress authorized the Corps to consent, and the Corps did so consent, to an encroachment upon the navigational servitude in this case. We turn now to the merits of these preliminary arguments.

It is clear that Congress may decide, in a particular case, not to assert the navigational servitude, "but rather to compensate owners of submerged land in navigable waters for actions which, like those to which the servitude is applicable, are grounded in the power of the Federal Government to regulate commerce." *Coastal Petroleum Co. v. United States*, 524 F.2d 1206, 1210 (Ct. Cl. 1975) (citing *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 739 (1950) and *Federal Power Commission v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 254, 256 (1954)). It is equally clear that "such a waiver of sovereign authority will not be implied, but instead must be

'surrendered in unmistakeable [sic] terms.' " *Cherokee Nation*, 107 S. Ct. at 1492 (quoting *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 106 S. Ct. 2390, 2397 (1986)).

After a thorough and thoughtful treatment of the question, the district court concluded that Congress had failed to evince a clear intent to forego the navigational servitude with respect to the Project. The district court found that while the statutory language relied upon by Lambert "recognizes the 'interest and rights' of states in determining the development of watersheds and in water utilization and control," none of the language presented constituted a congressional waiver of the navigational servitude. We find no error in the district court's well-reasoned conclusion at this point. As the district court noted, however, Congress need not completely renounce the navigational servitude; rather, it may authorize the Corps to waive it in certain cases. See *United States v. 119.67 Acres of Land, More or Less, Situated in Plaquemines Parish, State of Louisiana, et al.*, 663 F.2d 1328, 1335-37 (5th Cir. 1981); *United States v. Stoeoco Homes, Inc.*, 498 F.2d 597, 610 (3d Cir. 1979). With respect to the Project, the district court concluded that "Congress did not delegate to the Corps the authority to consent to encroachments on the federal navigation[al] servitude." We see no need to decide this question, for even if the Corps had the authority to waive the navigational servitude, the record clearly fails to demonstrate that it did so.

Initially, Lambert asserts that the Corps waived the navigational servitude in its dealing with Delta. The lands and easements necessary to the Project were acquired by the Red River Waterway Commission ("the Commission"), a local authority.⁷ Delta participated in extensive negotiations with

⁷ The Project was a "local cooperation project." Under the federal legislation authorizing the Project, the local governing authority — here, the

the Commission and the Corps before conveying the lands necessary for the Project to the Commission. Concerned about losing more lands if the lake created by the Project were developed for recreational use, Delta, according to Lambert, "sought to reserve certain property (including the disputed sand bar) from the . . . sale."⁸ The Corps responded that recreational plans were not firm but that any development would occur on the opposite bank of the river, if at all. The response noted, however, that a 50 to 200 foot "buffer zone" would be required on Delta's side of the river.⁹ The Corps' response cannot be regarded as an agreement not to take more property. Moreover, given the requirement that any waiver of the navigational servitude be made in unmistakable [sic] terms, the Corps' response can in no way be construed as a waiver of that "sovereign authority." See *Cherokee Nation*, 107 S. Ct. at 1492 (quoting *Bowen*, 106 S. Ct. at 2397).

Commission — was charged with acquiring all the land, easements and rights of way required for the construction of the Project. Any property so acquired, however, was to be subsequently conveyed to the United States.

⁸ Among other conditions to the proposed sale, Delta sought assurance "that the remaining lands south of the proposed Lock and Dam cut-off remain the property of Louisiana Delta Plantation and will not be taken by expropriation at a later date."

⁹ The relevant portion of the response reads:

"Recreational plans are not firm, although we do foresee development of the oxbow lake as a recreational feature of the project. Development would, however, be located on lands on the opposite bank of the river, with the exception that a visual esthetic [sic] barrier (buffer zone) would be required on the severed side. This barrier would be in the form of vegetation, and its width might vary from 50 feet to 200 feet from the ordinary high water line, depending upon the terrain. Certain uses would be permissible within the defined width of the visual barrier, provided that they were consistent with the existence of the oxbow lake as a natural area (inclosure 2). Further, some provision might be necessary to insure that undesirable effluent does not enter the oxbow lake."

Lambert next contends that because the Corps purchased some other tracts of land lying between the mean low water mark and the ordinary high water line (and therefore subject to the navigational servitude), they had consented to an encroachment on the navigational servitude. These acquisitions, however, were part of larger tracts of land and were contained in deed descriptions. It would be most unusual for the Corps to purchase such a tract of land only so far as the ordinary high water line. In that unlikely instance, the prior owner of the tract would still own the narrow strip of land between the mean low water mark and the ordinary high water line. That strip, of course, would still be subject to the navigational servitude. The acquisition of land subject to the servitude as a part of the purchase of a larger tract, therefore, would seem more a measure of convenience than a waiver of the navigational servitude. In any event, these deeds, having nothing to do with the Corps' exercise of the navigational servitude over the Disputed Bar, are inapposite to the instant case. Therefore, we remain unpersuaded by Lambert's claims that the Corps relinquished the navigational servitude in the instant case.

Lambert next argues that the district court erred by allowing Jones "to wield the [navigational] servitude as a contract claim defense." Lambert asserts that while "owners of submerged lands within navigable waters take their rights cognizant of the dominant servitude . . . it would be novel for this Court to hold that the agreements of contracting parties are subject to unilateral amendment by imposition of the same servitude." With this argument, Lambert attempts to evade the navigational servitude by imposing a different analytical framework on the problem: Lambert argues that the navigational servitude only applies to cases involving the fifth

amendment takings clause. Since the instant case is purely one of contract, therefore, the navigational servitude is irrelevant. Lambert had a valid lease to excavate sand from the Disputed Bar and Jones' wrongful eviction of Lambert from the sandbar occasioned the incurrence of additional costs in the performance of the contract.

Lambert's argument, however, ignores the fact that Lambert's suit rests solely upon the alleged wrongful eviction. It cannot arise from the Lambert Contract since that agreement was silent as to where Lambert would obtain sand. Lambert fails to even contend that its original bid for the Lambert Contract was calculated on the basis of its use of sand from the Disputed Bar. In fact, any such contention would be inherently suspect given Lambert's admitted awareness of the area's designation as a "Borrow Area for Closure Dam." Lambert cannot escape the navigational servitude by arguing its inapplicability between two private parties on a contract claim since its right to extract sand from the Disputed Bar arises solely from its lease with Delta. Lambert's assertion that the eviction was wrongful, therefore, is dependent upon the legal ramifications of its lease with Delta. If Delta could not complain of the Corps' use of the sandbar due to the exercise of the navigational servitude, then neither could Lambert. The lessee takes the lease subject to the same dominant servitude as the lessor. See *Cherokee Nation*, 107 S. Ct. at 1490 n.3 ("the navigational servitude is dominant to riverbed interests no matter how acquired."). We refuse to hold that Delta and Lambert could avoid the navigational servitude merely by executing a lease. Those acquiring rights in property subject to the navigational servitude take those rights fully cognizant of their limited nature. *Coastal Petroleum*, 524 F.2d at 1209.

Lambert also maintains that its eviction by the Corps was unreasonable in that “[i]t has never been the sovereign's province to exclude uses of land burdened by the navigational servitude which are compatible with the government's use.”¹⁰ Even if we accept this position as fact, we are unable to agree that the Corps' exercise of the navigational servitude in the instant case was unreasonable. First, Lambert never asserted this “fact” until after it fulfilled the Lambert Contract with materials from other excavation sites. Therefore, Lambert's assertion involves an exercise of hindsight unavailable to the Corps at the time of the eviction. If it had accepted Jones' invitation to seek recourse against the Corps in 1981, Lambert might have brought this fact to the Corps' attention and rendered nugatory the need for further litigation. It chose not to do so and cannot be allowed to profit from that decision. Moreover, the Corps' right to the Disputed Bar included the right to the top sand, the easiest and most economical to remove.

¹⁰ The district court found that “[t]he facts are disputed as to whether the Corps, by designating the borrow area for channel closure material, intended to exclude all other extracting activities not related to the channel closure dam operation.” The district court went on to conclude, however, that the resolution of this factual dispute was not material to its holding. We agree. Lambert failed to bring this “fact” to the Corps' attention prior to its completion of the Lambert contract with alternate materials. Moreover, given that sand from the Disputed Bar was not an element of Lambert's original bid calculations, the question of whether or not Lambert was justified in believing that the plan designation did not mean to exclude Lambert's use is immaterial in the instant case. Finally, even if the Corps did not originally mean to exclude all other excavation by the plan designation, it may still have been justified in objecting to Lambert's use. Specifically, the Corps may well have objected to Lambert's excavation of sand for the Construction Project before the needs of the Closure Dam were met. Therefore, the factual dispute is not material to the resolution of the instant case and cannot serve to preclude the entry of summary judgment. See *Anderson v. Liberty Lobby*, 106 S. Ct. 2505, 2510 (1986) (“Only disputes over facts which might affect the outcome of the suit under the governing laws will properly preclude the entry of Summary Judgment.”).

Jones also points to other concerns of the Corps, including the ecological ramifications of more extensive excavation and the potential tort liability inherent in leaving an "abnormal hole" in an area intended for water recreation. Thus, we are unprepared to accept the validity of Lambert's assertions on this point.

As demonstrated earlier, the Corps was justified in utilizing the navigational servitude to bar Lambert from extracting sand from the Disputed Bar. Lambert's "right" to excavate sand from the Disputed Bar was subservient to the Corps' use of the site for the Closure Dam.¹¹ As the district court con-

¹¹ Given the circumstances of this case, Lambert's reliance on *United States v. Kaiser Aetna*, 444 U.S. 164 (1979), would seem clearly misplaced. In *Kaiser Aetna*, a private developer sought to construct a marina on Kapua [sic, Kuapa] Pond, an underdeveloped privately owned body of water in Hawaii separated from navigable water by a barrier beach. The pond's maximum depth at high tide was two feet. Kaiser Aetna leased the pond for the development of the marina and notified the Corps of its plans. The Corps advised Kaiser Aetna that no permits were required for the development of its operations in Kapua [sic] Pond. Millions of dollars were invested to convert Kapua [sic] pond into a navigable private marina maintained with fees paid by users of the marina. Years later, the Corps attempted to invoke the navigational servitude in order to require the owners to grant the public a right of access to the marina. The Supreme Court disagreed with the Corps' position and wrote:

[W]hat petitioners now have is a body of water that was private property under Hawaiian law, linked to navigable water by a channel dredged by them with the consent of the Government. While the consent of individual officials representing the United States cannot "estop" the United States [citations omitted], it can lead to the fruition of a number of expectancies embodied in the concept of "property" — expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the land-owners [sic] property.

Kaiser Aetna, 444 U.S. at 179. Lambert contends that its situation is analogous to that of the property owner in *Kaiser Aetna*. We disagree. In the instant case, the Corps never explicitly consented to Lambert's lease agree-

cluded, "Lambert had no right to remove sand from the Delta sandbar in order to fulfill its contractual obligation to Jones." Jones, acting at the Corps' behest, was entitled to reject further deliveries of sand from the Disputed Bar as material from an unsuitable source. Jones, therefore, cannot be held liable for the Corps' proper exercise of the navigational servitude. Moreover, since Lambert did not rely on sand from the Disputed Bar in its original bid, Lambert could not sustain any equitable arguments militating in favor of an adjustment in contract prices. The district court, therefore, did not err in granting Jones' motion for partial summary judgment.

IV.

For the foregoing reasons, the judgment is AFFIRMED.

ment with Delta. Moreover, as noted earlier, the Corps' response to Delta's request for assurances could not be construed as a waiver of rights to the Disputed Bar. Lambert had no "expectancies" in the Disputed Bar — a piece of land expressly devoted to sand for the Closure Dam. Since any right to extract sand was subservient to the use of the property in aid of navigation, the Corps could, without compensation, preempt Lambert's use of the Disputed Bar in order to provide sand for the Closure Dam. See, e.g., *Coastal Petroleum*, 524 F.2d at 1211-12.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 87-4008

LAMBERT GRAVEL COMPANY, INC.

Plaintiff-Appellant,

VERSUS

J.A. JONES CONSTRUCTION COMPANY, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Louisiana

Before WISDOM, GEE, and KING*, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

*Formerly Carolyn Dineen Randall

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

January 7, 1988

ISSUED AS MANDATE: February 18, 1988

OP-JDT-9C
Rev. 4/85

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 87-4008

LAMBERT GRAVEL COMPANY, INC.,
Plaintiff-Appellant,
VERSUS
J.A. JONES CONSTRUCTION COMPANY, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Louisiana

ON PETITION FOR REHEARING
(February 8, 1988)

Before WIDSOM, GEE and KING*, Circuit Judges.

*Formerly Carolyn Dineen Randall

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

s/CAROLYN DINEEN KING
United States Circuit Judge

REHG-4

The Miller Act, 40 U.S.C. §§270a, *et seq.*

§270a. Bonds of contractors of public buildings or works

(a) Type of bonds required

Before any contract, exceeding \$25,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

- (1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.
- (2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than \$1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than \$1,000,000 and not more than \$5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than \$5,000,000 the said payment bond shall be in the sum of \$2,500,000.

(b) Waiver of bonds for contracts performed in foreign countries

The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Authority to require additional bonds

Nothing in this section shall be construed to limit authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

(d) Coverage for taxes in performance bond

Every performance bond required under this section shall specifically provide coverage for taxes imposed by the United States which are collected, deducted, or withheld from wages paid by the contractor carrying out the contract with respect to which such bond is furnished. However, the United States shall give the surety or sureties on such bond written notice, with respect to any such unpaid taxes attributable to any period, within ninety days after the date when such contractor files a return for such period, except that no such notice shall be given more than one hundred and eighty days from the date when a return for the period was required to be filed under Title 26. No suit on such bond for such taxes shall be commenced by the United States unless notice is given as provided in the preceding sentence, and no such suit shall be commenced after the expiration of one year after the day on which such notice is given.

§270b. Rights of persons furnishing labor or material

- (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under sections 270a to 270d of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, That [sic] any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop [sic] addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.
- (b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person

suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

* * *

§270d. "Person" defined

The term "person" and the masculine pronoun as used in sections 270a to 270d of this title shall include all persons whether individuals, associations, copartnerships, or corporations.

U.S. Const. art. I, §8, cl. 3.

"The Congress shall have Power . . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

PURCHASE ORDER
[Reprinted; original arranged
differently on page.]

Date: 5/12/80

J. A. JONES CONSTRUCTION COMPANY

ISSUED FROM: Box 82A Purchase Order No.
Vick, LA 71372 42-446-584

Seller: Lambert Gravel Company, Inc.
P. O. Drawer G
St. Francisville, LA 70775

Delivery Date Required: Per Job
Construction Schedule

Terms: See Conditions Listed Below

FOB: Sellers Plant With Full Freight
Allowed to Jobsite

Ship To: J.A. Jones
Construction Company

Project: Red River Lock & Dam
No. 1, Phase III

Location: End of Hwy. 1196
Vick, LA/Catahoula Parish

Please enter our order subject to terms, conditions, instructions and exhibits specified herein and by this reference made a part hereof.

ITEM: 1 QTY./UNIT: 300,000 ± /Ton
ARTICLE: Select Sand Backfill Item #16
UNIT PRICE: 4.60/Ton TOTAL PRICE: \$1,380,000.00

ITEM: 2 QTY./UNIT: 75,000 ± /Ton
ARTICLE: Select Sand Under Riprap Item #24
UNIT PRICE: 4.60/Ton TOTAL PRICE: \$ 345,000.00

ITEM: 3 QTY./UNIT: 150,000 ± /Ton
ARTICLE: Fine Concrete Aggregate
UNIT PRICE: 7.00/Ton TOTAL PRICE: \$1,050,000.00

ITEM: QTY./UNIT: 525,000 ± /Ton
ARTICLE: ESTIMATED TOTAL THIS ORDER
TOTAL PRICE: \$2,775,000.00

This order covers furnishing of the above materials in strict accordance with the contract documents for the project. Seller acknowledges that this order incorporates all applicable provisions of the plans, specifications, general provisions, special provisions and addenda 1 thru 10 for the Red River Lock & Dam #1, Phase III Construction, Contract No. DACW 29-80-C-0082, as if they were contained here in whole as they pertain to the above materials. Within the above documents there are shown obligations of the contractor. Seller agrees to assume these obligations whenever applicable to the production and delivery of its materials. The buyer recognizes that the seller is a material supplier and not a subcontractor. In the event that the prime contractor's contract with the owner is terminated, the seller will receive payment for partially completed work on the same basis as the Prime Contractor receives payment from the owner.

Continued on Page 2
GENERAL CONDITIONS ON REVERSE SIDE ARE A
PART OF THIS AGREEMENT.

ACCEPTED Retain original copy. Sign and return one copy promptly to issuing office.

SELLER: Lambert Gravel Company, Inc.

BY: s/Paul A. Lambert, Pres.

DATE: 7-30-80

INSTRUCTIONS IN INVOICING:

Invoices and shipping lists must show our order number and be rendered in THREE copies, to:

J.A. Jones Construction Company

Box 82A Star Route

Vick, LA 71372

J.A. Jones Construction Co., An Equal Opportunity Contractor

s/David L. Stout

Authorized Rep.

[Back of Page 1, P.O. No. 42-446-584, *handwritten*]

It is agreed that Paragraphs 1-18, in other words, the general conditions are to be deleted in their entirety providing, however, they do not vary waive or contradict any and all of the remaining terms and provisions of this purchase order, except that in lieu of any agreements to defend, save harmless

agreements or indemnity agreements relative to acts of omission or commission of the seller, either express or implied as to bodily injury or property damage, the seller will provide the buyer with certificates of its insurance coverage in the amounts of \$100,000 and \$300,000 minimum for general and automobile comprehensive liability per person and \$100,000 minimum per occurrence for property damage.

[Initials]/PAL, DLS

7-3-80

J. A. JONES CONSTRUCTION COMPANY

Page 2 Purchase Order No. 42-446-584

This order is subject to, but not limited to, the requirements contained in the following conditions:

- (1) Seller to render separate invoices twice monthly for cost of material and for the freight on material.
- (2) Unit prices listed in above schedule are applicable for calendar year 1980 only. Prices for 1981 & 1982 are as listed herein.

1981 - Select Sand Fill

4.83/Ton

Fine Concrete Aggregate	7.35/Ton
1982 - Select Sand Fill	5.06/Ton
Fine Concrete Aggregate	7.70/Ton

- (3) Buyer will withhold retainage in the amount of 7.5% of the purchase price for the first 50% of the estimated order. At the completion of the first 50% of the order, no additional retainage will be withheld if satisfactory progress is being achieved with respect to delivery of material as per schedule requirements and quality of material delivered. When 75% of the estimated contract is complete, retainage will be reduced on a straight line basis to 0.75% of the total estimated contract amount at 90% completion provided satisfactory progress as described above is being achieved. The remaining retainage will be returned upon completion of all deliveries.
- (4) Measurement of all material will be made on basis of sellers printed weigh tickets for each truck as weighed on the buyer's certified scale located at the jobsite. Two copies of each load ticket to be retained by the buyer.
- (5) Payment will be made by the 1st and 15th of the month following invoice submittal. Invoices must be received at job office no later than estimate cut-off dates agreed upon between the Corps of Engineers and Prime Contractor. (A schedule of these dates is enclosed).
- (6) Material to be dumped at the buyer's stockpiles in locations designated by buyer.

Continued on page 3

ACCEPTED Retain original copy. Sign and return one copy promptly to issuing office.

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J. A. JONES CONSTRUCTION COMPANY

Page 3 Purchase Order No 42-446-584

The stockpile area will be made accessible to the seller's over-the-road haul units under their own power.

- (7) Hours & Days of delivery will be approved by buyer to insure adequate inventory and inspection of material. Hours beyond normal 6 day a week, 10 hours per day must be specifically approved by buyer's management.
- (8) Material delivered to site not meeting specifications will not be measured for payment.
- (9) Quantities listed in purchase order are contractors estimate of quantities required. Seller will have exclusive rights to furnish job requirements for items 1, 2, & 3 provided his performance is satisfactory with respect to delivery and quality as listed above.
- (10) Seller will be responsible for all quality control measures for the materials covered by this purchase order including performance of tests, documentations & required submittals to assure compliance with the contract specifications prior to delivery. Additional testing done by the buyer at the jobsite will be at the buyer's expense.
- (11) Prices do not include sales or use taxes.
- (12) The buyer will perform moisture tests on the material as it is delivered to the jobsite. Any deliveries containing material with a moisture content exceeding 6.0% will be adjusted for payment based upon a moisture content of 6.0%. The buyer will make a reasonable effort to notify the seller when the moisture exceeds 6.0% so the seller can take steps at the plant to correct this excessive moisture.

- (13) Buyer will build and maintain all access roads and stockpile areas.
- (14) Buyer's estimated schedule of requirements are as follows:

Calendar Year 1980	20% of Order
Calendar Year 1981	60% of Order
Calendar Year 1982	20% of Order

ACCEPTED Retain original copy. Sign and return one copy promptly to issuing office.

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61a



Plan Drawing Reduced from

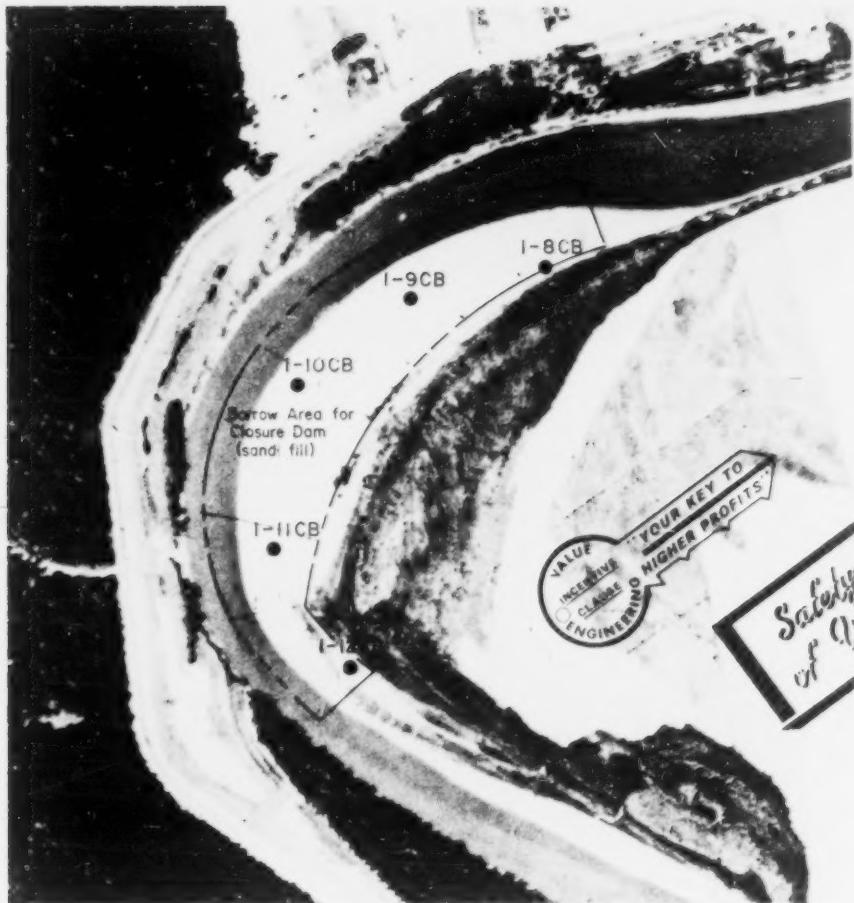
14" × 21" Original

Insets A & B in actual size on following pages.

62a

DESIGNED	DRAWN	CHECKED	DATE	BY	REVISION	FILE NO.
RJG	POH	PKB	JUNE 1979	AS SHOWN		H-4-28593
SPECS NO. <i>John J. Gennrich</i> DAGW29 79-B-0086				3/1	3/16	
BORING LOCATIONS						

Inset A — Plan Drawing 3/1 Legend



Inset B — Plan Drawing 3/1
Box Enclosing Disputed Sandbar



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

LAMBERT GRAVEL COMPANY, INC.

VERSUS

J.A. JONES CONSTRUCTION COMPANY, ET AL.

CIVIL ACTION NO. 84-1951 "A"

AFFIDAVIT

(Filed February 3, 1986)

STATE OF LOUISIANA

PARISH OF RAPIDES

BEFORE ME, the undersigned Notary Public, personally came and appeared:

PHILIP BEARD, P.E.
CONSULTING ENGINEER

who, being duly sworn did depose and say:

1. QUALIFICATIONS

- A. He received a B.S. degree in Civil Engineering from Louisiana State University in 1969.

- B. He has been engaged in the active practice of his profession as a structural and design civil engineer from 1969 till the present.
 - C. He is currently registered as a professional civil engineer in the states of Louisiana (1973), Texas (1978), and Tennessee (1984).
 - D. He is currently or has been an active member of the Louisiana Engineering Society, the American Consulting Engineering Council, the Consulting Engineering Council of Louisiana, the American Concrete Institute, and the American Society of Civil Engineers.
2. Thus qualified, he has, over the last seventeen years, been personally involved in all phases of design and structural civil engineering. He has personally supervised the production of working contract drawings, plans and specifications on projects requiring the use of borrow materials for fill and other purposes. Particularly, he has extensive personal experience drafting contract provisions intended to warn or notify prospective contract bidders of either exclusive or partial reservation of such borrow materials in connection with such projects. He has extensive personal experience in developing design drawings and specifications for the United States Army Corps of Engineers, and he has personally conducted a careful and complete study of the plans and specifications for the Red River Lock and Dam No. 1, Phase III Construction, including the general provisions, special provisions and Addenda 1-10. Specifically, he has examined Plan Drawing 3/1, on which lines enclose the sandbar disputed in this litigation, and a note within the lines which states: "Borrow Area for Closure Dam (sand fill)."
3. Based upon the foregoing, it is Affiant's opinion as a designer and interpreter of such contract provisions that the

lines enclosing the disputed sandbar on Plan Drawing 3/1, and the note appearing inside the lines do *not* convey exclusive reservation of the sandbar, or the sand materials on the sandbar, for use in constructing the closure dam, and further, that such contract provisions constitute insufficient notice to prospective bidders that the sand on the disputed sandbar was reserved for the exclusive use as fill for the closure dam.

s/PHILIP BEARD
Philip Beard, P.E.
Consulting Engineer

SWORN TO AND SUBSCRIBED before me this 31st day
of January, 1986.

s/NOTARY PUBLIC
(Original signed)
NOTARY PUBLIC